time this apprising was laid, and long after, down to the year 1672, or thereabouts, an apprising gave the right of property; and if, after the expiry of the legal, the appriser did not renounce the apprising, he was judged to lose his right of credit for ever, and to take land for his money: (The contrary found, *December* 7, 1631, *Scarlett* against *Paterson.)* Therefore, Jacobina Clark, having now no debt, and the property of the lands being lost by the positive prescription, has no claim at all. He was likewise of opinion, that the property of lands might be lost by the negative prescription, provided the possessor had any habile title to the lands; and for this he quoted a decision in 1782, *Town of Perth* against *Hospital,* where this indeed was not found, but supposed to be law; and he said it would be very unjust if it were otherwise, for, suppose a charter forged 100 or 150 years, so that it is impossible to detect the forgery, and suppose likewise that the proprietors have possessed all that time, without entering or making up their titles, so that they have no title of possession subsequent to the forged charter,—would it not be extremely hard, in such a case, that the negative prescription should not take place.

1746. *November* 23. ——— *against* GARTSHERIE.

[Kilk., No. 2, *Idiotry,* &c.; Falconer, No. 144.]

IN this case, it was debated whether a brief of idiotry, and one of furiosity, could be purchased against the same person at the same time,—the styles of the brieves being different, and the two diseases of the mind being not only different, but incompatible. It was likewise debated, how far the prosecuting of brieves of idiotry or furiosity was of the nature of a popular action, so that any man for fourteenpence could purchase a brief of idiotry against any man. The question, in a word, was, Whether the brieves in this case could proceed and come to the knowledge of the inquest? The Lords' deliverance upon this debate was somewhat extraordinary. They ordered the person, against whom the brieves were purchased, to be sisted before them in presence. Some days after, they altered this, and ordered him to be sisted before a committee of their number.—*Adhuc absentibus Præside et Arniston. November* 24. The same case came in again, when it was generally agreed among the Lords, that the prosecution of a brief of idiotry or furiosity was not a popular action, but required some title in the person of the purchaser of the brief. In this case, the nearest agnate was an infant, and the brieves were purchased by one of his tutors without the consent of the rest, so that the question was, Whether one tutor could be authorised by the Court to prosecute the brieves. And it carried he might; and, therefore, in order to know whether it was proper for the Court to interpose its authority, Gartsherie, the fatuous or mad person, was ordered to be produced before the whole Lords; which accordingly was done, and they severally, not upon the bench, but at the fireside, in a familiar way, asked him some questions. Upon the 2d of December, the Lords had a full hearing of each other upon the subject, and some were of opinion that he was fatuous, and some that he was not. But it was said by Lord

Elchies, (then President,) that it was not the question then before them, whether he was fatuous or not?—that was a question which the law had not given the determination of to their Lordships, but to a jury. The only question before the Court was, Whether there was sufficient cause to authorise the tutor to carry on the prosecution of the brieves? and he thought that it could not be denied that there was reason enough to inquire, at least, Whether Gartsherie was an idiot? If he was really so, there could not be a greater act of mercy than to give him a tutor, by means of whom, a person in those unhappy circumstances is less in hazard, with respect to his estate, than men in their right senses; for such men will often be guilty of negligences and mismanagements in their own affairs, which, if they had a tutor, he would be liable for. That an interdiction in this case is by no means a proper remedy; for, in the first place, if he be really an idiot, he cannot voluntarily interdict himself, because he has no will; nor can he be judicially interdicted, because, having no will, he cannot act even with consent of his inhibitors. And, secondly, suppose he could be interdicted, yet an interdiction in such a case would be a very inadequate remedy; for an interdictor is not liable for omissions,—he is only bound not to consent to a deed to the prejudice of the interdicted person. But he may name a factor upon the estate of the interdicted person, and may neglect to make that factor find caution, so that he may break, or run away with the rents, and yet the interdicted person have no relief against his interdictors. The interdictors may let prescription run against him: not to mention that interdiction only extends to lands, and not to moveables; whereas, the tutor for an idiot or furious person is bound to do exact diligence, and is liable for omissions as well as commissions; in a word, is in every respect liable as the tutor of a minor; and it is not certain but a man, cognosced an idiot, has the privilege of minors in other respects; so that, for example, prescription would not run against him. That a man is not an idiot only who cannot answer pertinently to any question whatsoever that is put to him,—no; such an absolute deprivation of understanding is not required to constitute a man an idiot in the sense of law; but, if he is such as is noways capable to do the ordinary business of life and manage his own affairs, "*sic quod timetur de alienatione tam terrarum suarum quam aliarum rerum mobilium et immobilium,*" according to the style of the brief, he is, in the construction of law, an idiot; and, for this reason, dumb and deaf persons are cognosced idiots, and have tutors appointed them, though, in the natural sense of the word, they may be far from idiots. See Stair's institution.

But, *2do et separatim,* Suppose the Lords, in this case, should have difficulty to authorise one single tutor against the consent of the rest, yet it may be doubted whether the brieves could not be carried on without either pupil or tutor, because the mother is here consenting, and, according to Sir James Balfour in his Practicks, not only the nearest agnate may purchase brieves of idiotry and furiosity, but any of the nearest relations, whether upon the father's or the mother's side. And anciently, in Scotland, it is probable that the king, of his own authority, issued such brieves without any private prosecutor at all, (as is said to be the practice in England to this day;) and, accordingly, these brieves make no mention of *lator præsentium,* as the brief of mortancestry does.

The Lords, by the President's casting vote, found, That the brieves should proceed. They likewise found, That there might be two brieves, one of idiotry,

and another of furiosity, taken out against the same person at the same time, of which there was one example; but they found, That there must be distinct claims and distinct retours upon the two brieves: though it was observed, that, by the Act 66 James III., it appears, that formerly there was but one brief both for idiotry and furiosity.

1747. *January* 14. ELECTION PROCESS of WICK.

IN this case, it was decided, That a dilatory exception, such as this, that one of the defenders was not cited at his dwelling-house, or, what the Lords thought the same thing, the place of his ordinary residence, as the summons bore, (which, in effect, was an improbation of the execution,) unless instantly verified, could only be proponed *sub periculo causæ*. This doctrine was founded on the authority of Lord Stair and the nature of the thing; for, otherwise, processes would be endless, if the defender were allowed to go on and demand, first, a proof of one dilatory defence, and then of another.

1747. *January* 16. ——— *against* ———.

Found,—That compensation might be admitted against a decreet in absence. In this case, precedents were searched, and it was found, That it had often been decided otherwise, but that the most and latest decisions were on this side.

1747. *January* 17. INVERKEITHING ELECTION PROCESS.

Sustained this no process, That the names of all the defenders were not mentioned in the executions, but only two of them, with the addition of "and others," which they thought did not come up to what was required by Act 6, 1673.

The like found in the election process of Wick, February 12, 1747.

1747. *January* 17. MONTROSE ELECTION PROCESS.

[Falconer, No. 166.]

IN this case, the President and Lord Elchies declared it as their opinion, that, where the Crown granted a warrant for a poll-election in a burgh, without requiring a report to be made to the King, (which sometimes happened,) in that case the Court of Session had jurisdiction to cognosce upon the poll, be-